

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

C.A. NO. 04CV10704RWZ

JOHN J. BAUGHAN,

Plaintiff

v.

KEITH PELLETIER, TODD OLIVER,  
FRANCOIS NAPERT, and SCOTT  
ARRINGTON

Defendant

DEFENDANTS' REPLY TO PLAINTIFF'S  
OPPOSITION TO MOTION TO DISMISS  
THE SECOND AMENDED COMPLAINT,  
AND PLAINTIFF'S REQUEST FOR  
ATTORNEY'S FEES

Now come the defendants in the above-captioned matter, and hereby reply to Plaintiff's Opposition to Motion to Dismiss the Second Amended Complaint, in particular plaintiff's request for attorney's fees contained therein. Defendants state that plaintiff's request for fees is wholly unfounded, as defendants' motion is based on facts pled or otherwise admitted by plaintiff and an accurate interpretation of relevant caselaw. Defendants further state that plaintiff's arguments to the contrary lack merit for the following reasons:

1. Plaintiff himself acknowledges the merit of defendants' motion by agreeing that his claim for libel is unsupportable and should be dismissed. Opposition, p.7, ¶1. In response to defendants' contention that the libel claim should be dismissed because it was not pled with sufficient specificity, plaintiff admits that he is unable to proffer any facts supporting said claim and, further, that he does not oppose dismissal of the claim. Id. Therefore, defendants' motion was clearly

justified and plaintiff's request for attorney's fees should be denied on this basis alone.<sup>1</sup>

2. Plaintiff's contention that defendants' motion "warped the caselaw" is wholly unfounded, as it is plaintiff who misstates the law in his Opposition. In response to defendants' contention that the defendant police officers are entitled to qualified immunity from plaintiff's claims, plaintiff states that qualified immunity "is a defense, not a ground for dismissal of the complaint coming out of the gate. It is ripe for determination in the context of a summary judgment motion or as a defense at trial." Plaintiff's Opposition, p.6, §F. The caselaw, however, is to the contrary. Qualified immunity " 'is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' " Saucier v. Katz, 533 U.S. 194, 200-201 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original)). Thus, whether an official is entitled to qualified immunity should be resolved " 'at the earliest possible stage in litigation.' " Saucier, 522 U.S. at 201 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)). As it is well-settled that the issue of qualified immunity should be resolved "at the earliest possible stage," plaintiff's argument otherwise is confounding, his contention that defendants "warped the caselaw" is ironic, and his request for attorney's fees is without merit.

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<sup>1</sup> During the Local Rule 7.1 conference regarding defendants' motion to dismiss, defense counsel asked plaintiff to provide the specific facts underlying his libel claim, which would enable defendants to forego requesting dismissal of said claim. Plaintiff's counsel refused, thereby forcing defendants to address the claim in their Motion to Dismiss. Plaintiff's refusal to dismiss his libel claim at that time, when he clearly did not have facts sufficient to support the claim, was vexatious, and renders his request for attorney's fees an exercise in hypocrisy. Indeed, the fact that plaintiff's second counsel filed and signed the Second Amended Complaint without adequately investigating the supportability of the libel claim included therein raises Rule 11 concerns.

3. Plaintiff's contention that defendants improperly treated as admitted facts contained in a police report, which was attached to plaintiff's Original Complaint and First Amended Complaint, is without merit. Plaintiff's Opposition, p.1, ¶2; p.7, ¶4. This document is properly considered by the Court, pursuant to Fed. R. Civ. P. 10(c), see also O'Brien v. DiGrazia, 544 F.2d 543, 545 n.1 (1st Cir. 1976), and plaintiff provides no legal support for his contention otherwise. Further, defendants note that the Second Amended Complaint does not deny the relevant assertions in the police report: Specifically, that plaintiff was driving with an expired registration and rolled through a Stop sign without stopping, that he refused to undergo field sobriety tests, and that he refused to return to his car when ordered to by the defendant officer. As such, plaintiff's contention that it was "legally disingenuous" for defendants to treat these facts as admitted is, itself, disingenuous.
4. Plaintiff's request that he be awarded fees for opposing the Motion to Dismiss is utterly misplaced, given that plaintiff's inability to plead a coherent complaint has created numerous hours of unnecessary work for defendants. Plaintiff's original Complaint was a lengthy, convoluted morass, featuring 23 counts against 13 defendants. In response to this Court's order to streamline his claims, plaintiff filed an Amended Complaint that was equally prolix, featuring 23 counts against eight defendants. In response, defendants filed a detailed Motion to Dismiss the Amended Complaint, an effort that went for naught when plaintiff, subsequent to the filing of the Motion to Dismiss, again moved to amend the complaint. In moving to amend, plaintiff specifically admitted that the defendants' motion to

dismiss was meritorious and that the Amended Complaint was not viable. The Second Amended Complaint sought to remedy deficiencies in the earlier complaints, in part, by removing facts pled in the earlier complaints that ran counter to plaintiff's claims.<sup>2</sup> In allowing the second amendment, this Court stated that the plaintiff would be bound by the admissions in prior complaints. Defendants thus filed a second Motion to Dismiss, which is the subject of plaintiff's request for fees.

5. Despite having had to respond to three separate complaints in this matter, none of which, the defendants contend, has merit, the defendants have not requested that they be awarded their attorney's fees for the time wasted by the plaintiff's improper pleadings. It is indeed ironic that plaintiff now would claim entitlement to such a sanction. The procedural history of this case renders plaintiff's request for fees especially hypocritical, and the request should be denied on this additional basis.<sup>3</sup>

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<sup>2</sup>In his motion to amend, plaintiff's counsel also stated that defendants did not comply with Local Rule 7.1 prior to filing their Motion to Dismiss. As stated by defense counsel in an affidavit filed with this Court, this statement was patently false.

<sup>3</sup> Defendants note a further irony in plaintiff's request for fees. Plaintiff's initial counsel filed a Motion to Withdraw on the purported grounds that he has become unable to represent plaintiff for medical reasons. The true reason for prior counsel's need to withdraw, however, is that he was recently disbarred by the Massachusetts Supreme Judicial Court. See Exhibit A.

WHEREFORE, defendants respectfully request that this Court allow their Motion to Dismiss the Second Amended Complaint, and deny plaintiff's request for attorney's fees.

DEFENDANTS,

By their attorneys,

/s/Jonathan M. Silverstein

Jonathan M. Silverstein (BBO# 630431)

Jackie Cowin (BBO# 655880)

Kopelman and Paige, P.C.

Town Counsel

31 St. James Avenue

Boston, MA 02116

(617) 556-0007

235351/METG/0554

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO: BD-2004-042

IN RE: EMILE E. MORAD

JUDGMENT OF DISBARMENT

This matter came before the Court, Sosman, J., on an Information and Record of Proceedings with the Vote and Recommendation of the Board of Bar Overseers filed by the Board on April 30, 2004. Upon consideration thereof and for reasons stated in the Memorandum of Decision and Order of this date, it is ORDERED and ADJUDGED that: -

1. EMILE E. MORAD is hereby disbarred from the practice of law in the Commonwealth of Massachusetts and the lawyer's name is stricken from the Roll of Attorneys. In accordance with S.J.C. Rule 4:01, sec. 17(3), the disbarment shall be effective thirty days after the date of the entry of this Judgment. The lawyer, after the entry of this Judgment, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter of any nature. During the period between the entry date of this Judgment and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

It is FURTHER ORDERED that:

**EXHIBIT A**

2. Within fourteen (14) days of the date of entry of this Judgment, the lawyer shall:

a) file a notice of withdrawal as of the effective date of the disbarment with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2(c) and 2(d) of this Judgment, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

b) resign as of the effective date of the disbarment all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2(c) and 2(d) of this Judgment, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has been disbarred; that he is disqualified from acting as a lawyer after the effective date of the disbarment; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has been disbarred and, as a consequence, is disqualified from acting as a lawyer after the effective date of the disbarment;

e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

f) refund any part of any fees paid in advance that have not been earned; and

g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his possession, custody or control.

All notices required by this paragraph shall be served by certified mail, return receipt requested, in a form approved by the Board.

3. Within twenty-one (21) days after the date of entry of this Judgment, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of this Judgment and with bar disciplinary rules. Appended to the affidavit of compliance shall be:

a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries,



attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court;

b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of this Judgment any client, trust or fiduciary funds;

c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of this Judgment or thereafter;

d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall

maintain complete records of the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, Section 17.

4. Within twenty-one (21) days after the entry date of this Judgment, the lawyer shall file with the Clerk of the Supreme Judicial Court for Suffolk County:

a) a copy of the affidavit of compliance required by paragraph 3 of this Judgment;

b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

c) the residence or other street address where communications to the lawyer may thereafter be directed.

By the Court (Sosman, J.),

  
Assistant Clerk

Entered: August 27, 2004